

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Implementation of the Satellite Home
Viewer Improvement Act of 1999

Application of Network Nonduplication,
Syndicated Exclusivity, and Sports Blackout
Rules to Satellite Retransmissions

CS Docket No. 00-2

COMMENTS OF ECHOSTAR SATELLITE CORPORATION

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SUMMARY

EchoStar Satellite Corporation (“EchoStar”) hereby submits its comments on the Notice of Proposed Rulemaking (“NPRM”) in the above captioned proceeding.¹ This rulemaking was undertaken by the Commission in response to Section 1008 of the Satellite Home Viewer Improvement Act of 1999,² which instructs the Commission to implement rules and procedures governing network nonduplication (“nondup”), syndicated program exclusivity (“syndex”), and sports blackout requirements for satellite carriers.

In short, the Commission’s task in this rulemaking would not be complete if the Commission were to transplant mechanically to the satellite area the rules applicable to cable systems. Rather, the Commission must apply syndex, nonduplication and sports blackout protections in a manner that appropriately recognizes the distinctive characteristics of nationwide satellite coverage and associated issues of technical feasibility and cost, as well as the very real risk that satellite superstation carriage may simply be discontinued if the rules resulting from this proceeding are unduly onerous, resulting in loss of programming for over one million subscribers. These issues cannot be overlooked in any attempt to impose meaningful blackout regulations. The logistics, encryption and software requirements that would be involved in

¹ *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999; Application of Network Nonduplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions*, CS Docket No. 00-2, Notice of Proposed Rulemaking, FCC 00-4 (rel. Jan. 7, 2000) (“NPRM”).

² Act of Nov. 29, 1999, P.L. 106-113, § 1000(9), 113 Stat. 1501 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999 (“SHVIA”), Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 (“IPACORA”), relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.).

scrambling different parts of the programming of a nationwide superstation feed for a mosaic of 35-mile zones scattered throughout the country are so overwhelming that, in an extreme regime of blackout requirements unmitigated by any exceptions, the likely result would be the end of satellite retransmission of certain superstation signals.

Adaptation as opposed to mechanical importation of the relevant cable rules is the only approach consistent with the intent of Congress and is also the only sensible approach from a public policy perspective, for several reasons. **First**, had Congress intended implementation of Section 339(b) to be as simple as the stroke of a pen, it would have simply undertaken it itself: it would have made the cable rules applicable to satellite carriers without further ado and without need for a Commission rulemaking.

Second, the cable rules *themselves* contain provisions that are geared to take account of distinctive cost considerations facing cable operators -- they exempt small cable operators from the syndex deletion requirement on account of the cost of equipment that would be required. Even if the Commission were to view its task as one of near-mechanical importation from the cable rules, the Commission should still establish similar exceptions to take account of the corresponding (and here, much more formidable) difficulties facing satellite carriers.

Third, Congress evidently believed that compliance with at least certain of the rules in question may well be technically infeasible or economically prohibitive in the satellite area. The legislative language is admittedly somewhat perplexing in this regard, as these considerations are expressly included for purposes of sports blackout rules for network stations, but omitted for purposes of sports blackout rules for superstations. The Conference Report does not help clarify the confusion. If satellite carriers, however, cannot comply with a deletion rule

in the case of retransmission of network stations, they likewise will not be able to comply with the same rule in the case of retransmission of superstations. It is inconceivable, therefore, that Congress would have deliberately instructed the Commission to promulgate a rule requiring deletion of *superstation* programming without regard to feasibility even as it fully acknowledged the possibility that the satellite carrier might not be capable of complying with a rule requiring deletion of *network* sports programming.

In any event, even if the reference to the technical and economic considerations in one but not the other clause had more meaning than logic suggests, the difference would only mean that the Commission is not free to completely refrain from imposing the protections contemplated in (A) (syndex, network nondup and sports blackout for superstations), whereas it has that freedom in the case of (B) (sports blackout rules for network stations) upon a finding that the rules would be technically infeasible or economically prohibitive. At the same time, the Commission is certainly free to consider technical and economic considerations in *fashioning* the protections contemplated by clause (A) and establishing appropriately circumscribed exceptions.

Fourth, the Commission has appropriately requested comment on whether the proposed application of these rules is “consistent with the statutory requirements and the Commission’s goal of facilitating competition in the multichannel video programming distribution marketplace.”³ As the NPRM recognizes, the Commission should take into consideration the overall intent of the statute, which is “to place satellite carriers on an equal footing with cable operators with respect to the availability of broadcast programming when formulating its regulations for satellite carriers.” NPRM ¶ 1. EchoStar does not believe that

³ NPRM ¶ 2.

imposing rules so onerous as to result in cessation of satellite retransmissions would be consistent with that goal. To the contrary, unless appropriately mitigated, such rules would have the effect of stymieing competition with cable operators, who would of course be able to continue retransmitting the superstation programming feeds – programs that rank among the more popular staples of any MVPD offering. The *creation* of a programming handicap for satellite carriers compared to cable would be an ironic and perverse result of a law whose impetus was to cure precisely such a handicap – the unavailability of local network signals on satellite platforms. The goals of SHVIA would remain unattained – indeed, would be resoundingly defeated – if the operation of the law itself were to create yet another respect in which satellite carriers would be made less attractive than cable operators because of a legal constraint. Nor, most fundamentally, can it be in the interest of the consumer to deprive him or her from superstation programming offered by satellite.

Thus, EchoStar urges the Commission to develop a regulatory framework customized to the realities of satellite retransmission. Among other things, the Commission should rule that the deletion requirement for superstation programming (whether syndicated or network programming) does not set in unless requested by qualified broadcast stations whose geographic zones (not counting overlaps) cover a substantial majority of the nation. Such a requirement would avoid the virtual impossibility of dealing with a nationwide mosaic of diverse deletion requests for the same feed. Furthermore, the Commission should establish a procedure for exempting satellite carriers from the syndex and network nondup requirements on a case-by-case basis upon a showing of extraordinary hardship such as a possible loss of hundreds of thousands of subscribers. Also, the Commission should establish a parallel process where

affected superstations could petition for exemption or other relief on the basis of a showing of hardship.

As to sports blackout, the Commission should *not* at this point impose any sports blackout rules on satellite carriers, at least with respect to network stations (where, as the Commission notes, the cost is especially unjustified in light of the rare occurrences in which a sports team would be capable of invoking the rule). And the Commission should apply programming deletion requirements only to distant, not local-into-local, retransmissions. The geographic exclusivity rationale proffered in defense of these requirements is plainly inapplicable to local retransmissions.

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To: The Commission

COMMENTS OF ECHOSTAR SATELLITE CORPORATION

EchoStar Satellite Corporation ("EchoStar") hereby submits its comments on the Notice of Proposed Rulemaking ("NPRM") in the above captioned proceeding.¹ This rulemaking was undertaken by the Commission in response to Section 1008 of the Satellite Home Viewer Improvement Act of 1999,² which instructs the Commission to implement rules

¹ *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999; Application of Network Nonduplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions*, CS Docket No. 00-2, Notice of Proposed Rulemaking, FCC 00-4 (rel. Jan. 7, 2000) ("NPRM").

² Act of Nov. 29, 1999, P.L. 106-113, § 1000(9), 113 Stat. 1501 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA"), relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.).

and procedures governing network nonduplication (“nondup”), syndicated program exclusivity (“syndex”), and sports blackout requirements for satellite carriers.

In short, the Commission’s task in this rulemaking would not be complete if the Commission were to transplant mechanically to the satellite area the rules applicable to cable systems. Rather, the Commission must apply syndex, nonduplication and sports blackout protections in a manner that appropriately recognizes the distinctive characteristics of nationwide satellite coverage and associated issues of technical feasibility and cost, as well as the very real risk that satellite superstation carriage may simply be discontinued if the rules resulting from this proceeding are unduly onerous, resulting in loss of programming for over one million subscribers. These issues cannot be overlooked in any attempt to impose meaningful blackout regulations. The logistics, encryption and software requirements that would be involved in scrambling different parts of the programming of a nationwide superstation feed for a mosaic of 35-mile zones scattered throughout the country are so overwhelming that, in an extreme regime of blackout requirements unmitigated by any exceptions, the likely result would be the end of satellite retransmission of certain superstation signals.

I. THE COMMISSION SHOULD TAKE ACCOUNT OF TECHNICAL AND ECONOMIC CONSIDERATIONS

Section 1008(b)(1) provides that within 45 days after the enactment of the SHVIA, the Commission should commence a rulemaking to establish regulations that:

- (A) apply network nonduplication protection (47CFR 76.92) syndicated exclusivity protection (47 CFR 76.151), and sports blackout protection (47 CFR 76.67) to the retransmission of the signals of nationally distributed superstations by satellite carriers to subscribers; and

- (B) to the extent technically feasible and not economically prohibitive, apply sports blackout protection (47 CFR 76.67) to the retransmission of the signals of network stations by satellite carriers to subscribers.³

EchoStar agrees that Congress intended the Commission to apply rules which are “as similar *as possible*” to the current cable regime. *See Joint Explanatory Statement of the Committee of Conference on H.R. 1554*, 106th Cong., 145 Cong. Rec. H11793, H11796 (daily ed. Nov. 9, 1999) (emphasis added). At the same time, Congress purposefully did not mandate that these rules be duplicated in every aspect whether duplication is possible or not. Rather, the Commission should *adapt* these requirements in a manner that takes account of the distinctive characteristics and peculiar burdens confronting satellite operators.

In particular, with respect to the burdens of compliance with syndex, nondup and sports blackout requirements, it is difficult to overstate the scope of the practical differences between cable and satellite distributors. Unlike the local cable system, a satellite carrier beams down its programming to all of the nation, an area including all of the 35-mile specified zones of all the broadcasters in the country. To comply with a draconian regime of cable syndex and network nondup rules (short of no longer retransmitting the affected superstation feeds), a satellite carrier would need to develop a huge database categorizing millions of subscribers on the basis of whether they live within the 35-mile zone (and also within narrower 10-mile zones) of each commercial broadcast station in the country – a threshold task that is in itself impossible to carry out and would doom any attempt at compliance from the outset. Then, the satellite

³ Section 1008 of the SHVIA, to be codified at 47 U.S.C. § 339(b)(1)(A)&(B).

carrier would need to add an untold number of layers of complexity to its authorization/unscrambling procedures to be prepared to respond to a mosaic of deletion requests from all over the nation, and to delete different programs in the same superstation feed for different 35-mile zones scattered throughout the country. These are very real and formidable burdens, and the Commission should not overlook or discount them in this rulemaking process.

Nor are these differences a factor that EchoStar now brings up for the first time – they have already been recognized as relevant by the Commission and Congress itself. It was this difference between local cable operators and national satellite providers which led Congress to condition the implementation of syndicated exclusivity rules for satellite earth station receivers as part of the Satellite Home Viewer Act of 1998⁴ upon a Commission finding that such rules would be economically and technically feasible. The Commission found during a notice of inquiry and notice of proposed rulemaking proceeding in that instance that such rules were not feasible under the circumstances.⁵ The Commission specifically concluded:

application of exclusivity rules to the nascent HSD industry, which is still relatively small and rural, is infeasible at this time. Equipment to implement exclusivity protection is not currently available, and even if such equipment were developed, manufactured, and placed in service with all possible speed, its distribution in the marketplace would likely be incomplete when the interim compulsory copyright license that is the reason for protection expires at the end of 1994. Accordingly, for the reasons set forth below, we find that currently it is technically infeasible to

⁴ Pub. L. No. 100-667, Title II, 102 Stat. 3949 (1988).

⁵ *In the Matter of Imposing Syndicated Exclusivity Requirements on Satellite Delivery of Television Broadcast Signals to Home Satellite Earth Station Receivers*, Gen. Docket No. 89-89, Report and Order, FCC 90-431, 6 FCC 725 (rel. Feb. 8, 1991).

apply syndicated exclusivity regulation to the distribution of satellite signals to HSD owners, and even if such rules were technically feasible, we find that economically they would be infeasible.

Id. at ¶ 13 (footnote omitted).

While the Commission tied the technical feasibility part of its rationale to the then termination date of the copyright license, its conclusions as to economic feasibility were not likewise qualified.⁶ Indeed, the burdens on satellite distributors associated with syndex have increased in one key respect, as DBS distributors now serve millions of urban subscribers in every single metropolitan center in the nation.

EchoStar realizes that the 1999 SHVIA (in contrast with the 1988 SHVA) imposes on Commission a mandate to put in place syndex and nondup protection for the retransmission of superstations. At the same time, it would be a huge mistake to confuse this mandate with a congressional directive to ignore the characteristics of satellite retransmission. Adequate recognition of these characteristics is consistent with Congressional intent and sensible public policy, for several reasons.

First, if it were the intent of Congress for the Commission to automatically employ the cable rules in the satellite context, then Congress would have simply made these rules applicable to satellite carriers without need for a Commission rulemaking. Instead, Congress ordered the Commission to conduct a rulemaking proceeding, evidently because it

⁶ In fact, the Commission also rejected partial syndex requirements covering only certain markets.

clearly understood that “the practical differences between the two industries must be recognized and accounted for.”⁷

Second, the cable rules *themselves* contain provisions that are geared to take account of distinctive cost considerations facing cable operators – they exempt small cable operators from the syndex deletion requirement on account of the cost of equipment that would be required. Even if the Commission were to view its task as one of near-automatic importation of the cable regime, the Commission should still establish similar exceptions to take account of the corresponding (and here, much more formidable) difficulties facing satellite carriers.⁸

Third, Congress evidently believed that compliance with at least certain of the rules in question may well be technically infeasible or economically prohibitive in the satellite area. The legislative language is admittedly somewhat perplexing in this regard, as these

⁷ *Joint Explanatory Statement of the Committee of Conference on H.R. 1554*, 106th Cong., 145 Cong. Rec. H11792 (daily ed. Nov. 9, 1999).

⁸ The Commission identifies the relevance of this exception and requests comment on it in the context of sports blackout rule. *See* NPRM ¶ 25. In fact, however, the exception is fully relevant to satellite syndex and network nondup as well. Even the most draconian possible construction of the law would not suggest that Congress intended the Commission to import syndex and network nondup rules from the cable area after *stripping* them of protections available to the cable systems and the cost-related concerns underlying those protections. Furthermore, the true relevance of this exception would be missed if the Commission merely tried to replicate it, as the NPRM appears to suggest by inquiring whether the number “1,000” subscribers (used to determine which cable systems qualify for the exception) is still a relevant gauge in the satellite area. The only way to ensure equivalent protections for satellite operators is to go back to the *rationale* for the exception (concerns that the equipment needed for compliance with the rules would be too expensive for small cable operators). Here, the concerns with the technical feasibility and cost of compliance are more serious by several orders of magnitude than in the case of small cable operators, and the only way to achieve equivalence as between cable and satellite regulations is to promulgate exceptions corresponding to the same concerns that informed the small cable system exception, not just to replicate an exception that turns on a meaningless criterion for satellite carriers.

considerations are expressly included for purposes of sports blackout rules for network stations, but omitted for purposes of sports blackout rules for superstations. The Conference Report does not help clarify the confusion. A careful analysis, however, demonstrates that the NPRM's preliminary view about what "appears" to be the Congressional intent is incorrect.⁹ If satellite carriers cannot comply with a deletion rule in the case of retransmission of network stations, they likewise will not be able to comply with the same rule in the case of retransmission of superstations. It is inconceivable, therefore, that Congress would have deliberately instructed the Commission to promulgate a rule requiring deletion of *superstation* programming without regard to feasibility even as it fully acknowledged the possibility that the satellite carrier might not be capable of complying with a rule requiring deletion of *network* sports programming.

In any event, even if the reference to the technical and economic considerations in one but not the other clause had more meaning than logic suggests, the difference would only mean that the Commission is not free to completely refrain from imposing the protections contemplated in (A) (syndex, network nondup and sports blackout for superstations), whereas it has that freedom in the case of (B) (sports blackout rules for network stations) upon a finding that the rules would be technically infeasible or economically prohibitive. At the same time, the Commission is certainly free to consider technical and economic considerations in *fashioning* the protections contemplated by clause (A) and establishing appropriately circumscribed exceptions.

⁹ See NPRM at ¶ 27 ("The SHVIA's directive to apply the network nonduplication, syndicated exclusivity, and sports blackout rules to satellite retransmission of nationally distributed superstations appears to apply without any limitation based on a satellite carrier's technical ability to comply.").

Fourth, the Commission has appropriately requested comment on whether the proposed application of these rules is “consistent with the statutory requirements and the Commission’s goal of facilitating competition in the multichannel video programming distribution marketplace.”¹⁰ As the NPRM recognizes, the Commission should take into consideration the overall intent of the statute which is “to place satellite carriers on an equal footing with cable operators with respect to the availability of broadcast programming when formulating its regulations for satellite carriers.” NPRM ¶ 1. EchoStar does not believe that imposing rules so onerous as to result in cessation of satellite retransmissions would be consistent with that goal. To the contrary, unless appropriately mitigated, such rules would have the effect of stymieing competition with cable operators, who would of course be able to continue retransmitting the superstation programming feeds – programs that rank among the more popular staples of any MVPD offering. The *creation* of a programming handicap for satellite carriers compared to cable would be an ironic and perverse result of a law whose impetus was to cure precisely such a handicap – the unavailability of local network signals on satellite platforms. The goals of SHVIA would remain unattained – indeed, would be resoundingly defeated – if the operation of the law itself were to create yet another respect in which satellite carriers would be made less attractive than cable operators because of a legal constraint. Nor, most fundamentally, can it be in the interest of the consumer to deprive him or her from superstation programming offered by satellite.¹¹

¹⁰ NPRM ¶ 2.

¹¹ EchoStar agrees with the Commission that “providing access to national programming carried by the superstation” was one of the objectives balanced by Congress (NPRM ¶ 9). At the same time, EchoStar disagrees in part with NPRM’s view that hanging on

(Continued ...)

II. THE COMMISSION SHOULD DEVELOP A REGULATORY FRAMEWORK THAT CONSIDERS THE SATELLITE PROVIDERS' DISTINCTIVE TRAITS

Thus, EchoStar urges the Commission to develop a regulatory framework customized to the realities of satellite retransmission. Among other things, the Commission should rule that the deletion requirement for superstation programming (whether syndicated or network programming) does not set in unless requested by qualified broadcast stations whose geographic zones (not counting overlaps) cover a substantial majority of the nation. Such a requirement would avoid the virtual impossibility of dealing with a nationwide mosaic of diverse deletion requests for the same feed. Furthermore, the Commission should establish a procedure for exempting satellite carriers from the syndex and network nondup requirements on a case-by-case basis upon a showing of extraordinary hardship such as (a) a possible loss of hundreds of thousands of subscribers or (b) a showing that it is infeasible (technically or economically) to comply with broadcaster's requests for program blackouts *and* continue carriage of a superstation's signal. Also, the Commission should establish a parallel process where affected superstations could petition for exemption or other relief on the basis of a showing of hardship.

The Commission should also rule that a station can only exercise syndex or

the other side of the balance was "a recognition that, in the absence of retransmission consent requirements, broadcasters and rights holders will have no opportunity to protect their contractual rights." *Id.* In fact, broadcasters have an opportunity to protect their contract rights regardless of the SHVIA – in court through a breach of contract suit if they believe that a programmer has violated an exclusivity clause. While this part of the SHVIA was unquestionably intended to give *more* rights to the broadcasters, protection of their contractual rights exists regardless of the statute. The Commission should not lose sight of the objective of securing continued consumer access to superstation programming in the name of protecting rights that the broadcasters have already.

nondup rights if its contractual exclusivity right is clear (*i.e.*, it clearly covers satellite retransmission by satellite) and is non-discriminatory and exercised by a non-discriminatory fashion (*i.e.*, it does not result in certain distributors or distribution mediums being required to delete the programming even as another distributor or group of distributors do not need to delete it). Naturally, the 60-day prior notice and contract disclosure requirements should apply to satellite carriers as well. As to sports blackout, the Commission should *not* at this point impose any sports blackout rules on satellite carriers, at least with respect to network stations (where, as the Commission notes, the cost is especially unjustified in light of the rare occurrences in which a sports team would be capable of invoking the rule).¹²

Moreover, EchoStar agrees with the NPRM that the Commission should apply programming deletion requirements only to distant, not local-into-local, retransmissions.¹³ The geographic exclusivity rationale proffered in defense of these requirements is plainly inapplicable to local retransmissions. And the Commission should absolutely not consider any *further* sports blackout restrictions on satellite carriers beyond the statutory mandate and the rules applicable to cable operators. *See, e.g.*, NPRM ¶ 33. EchoStar respectfully believes that the sports leagues enjoy ample contractual protections and overwhelming leverage already, and do not need any additional protection to be volunteered for their benefit without any provision in the legislation.

¹² If any sports blackout rules were to be adopted, they should apply only to regularly scheduled events, and the deletion obligation should require 60-day prior notice.

¹³ *See* NPRM ¶ 11.

III. CONCLUSION

As detailed above, EchoStar respectfully requests that the Commission adopt a separate syndex/nondup regime for satellite carriers that is customized to the realities of satellite retransmission.

Respectfully submitted,

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Dated: February 7, 2000

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I, Colleen Sechrest, hereby declare that copies of the foregoing Comments of EchoStar Satellite Corporation were sent this 7th day of February, 2000 by messenger to the following:

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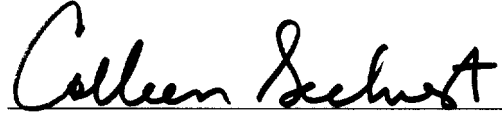
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